No. 86-730

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

GERALDINE G. CANNON,

Petitioner,

v.

LOYOLA UNIVERSITY OF CHICAGO *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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December 1986

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REPLY ARGUMENT

I. Respondents' Comments On The Merits Are Misleading.

Although the issue here is not whether petitioner will prevail on the merits, respondents joint brief in opposition to the petition points to certain of petitioner's qualifications and suggests that she was not admitted – or would not be admitted – to medical school on those grounds. The facts suggest otherwise.

First, respondents observe that petitioner applied to ten schools but was admitted to none. (Jt. Br. Op. p.2). Younger applicants with lower college grade point averages and Medical College Admission Test ("*MCAT*") scores

were admitted at each school. (Complaint par.15). Chicago Medical has confirmed that petitioner's average MCAT score was higher than 103 of the 117 persons admitted at that school. Petitioner's admission to none of the schools reflects the preclusive effect of the illegal age criterion at each. She was not only denied a *fair* chance of admission – she was denied *any* chance.

Second, respondents note that the MCAT was revised in 1977, long after petitioner took the test as a college senior in 1974, and renew their related suggestion of mootness which the Seventh Circuit specifically declined to affirm in the last prior action. (Jt. Br. Op. p.4 n.2, p.6n. 4). At all times here pertinent virtually every successful medical school applicant has been accepted on the basis of MCAT scores obtained during, or within one year after the completion of, his or her premedical studies. Scores on both the old and new versions of the test are fairly comparable. In fact, scores on either version were accepted for applications to both the 1978 and 1979 entering classes. In view of petitioner's higher scores than a substantial portion of the accepted applicants at each school and of approximately 90% of those accepted at Chicago Medical, respondents' suggestion that MCAT scores were the reason for the denial of her applications is absurd.

Respondents further note Justice Powell's concern for the burden of private litigation on non-profit institutions. (Jr. Br. Op. p.6n.3). That concern, however, was related to the difficulties petitioner and others might face in proving discriminatory intent. Since *Gaurdians Association of Police v. Civil Service Commission of the City of New York,* 463 U.S. 582 (1983), they need not do so. In any event, the schools reaffirmation of their age criteria for admission, long after they were aware of both the disparate impact on women and the lack of academic justification, is now clear beyond cavil.

II. The Dismissal Of Prior State Claims For Lack Of Pendent Jurisdiction Confirms The Conflict With Decisions Of This Court And Other Courts Of Appeals On Rule 41(b).

Respondents' statement of the first two prior cases omits any reference to the claims made under state law in those actions. (Jt. Br. Op. pp. 2-4). While respondents did not and could not deny that the prior complaints asserted state as well as federal claims, the omission of any reference to the state claims obscures the full sweep of their argument. With the dismissal of all federal claims before trial, the district court did not exercise pendent jurisdiction over the state claims. *United Mineworkers v. Gibbs*, 383 U.S. 715, 726 (1966). Even if the dismissal of federal claims did operate as an adjudication on the merits as respondents claim, dismissal of the state claims as well was necessary to make the prior judgments final and bar all further claims under the doctrine of *res judicata*. Respondents do not attempt to explain how the dismissal of petitioner's state claims for lack of pendent jurisdiction could operate as a final adjudication on the merits.

Petitioner, of course, maintains that the dismissal of her prior federal claims for failure to state a claim either arising under federal law or authorized by federal civil rights law, resulted in a lack of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343(4) and prevented the dismissals from operating as adjudications on the merits under Rule 41(b), Fed. R. Civ. P. (Pet. Cert. pp. 7-9). The distinctions asserted by respondents with respect to the decisions of this Court and The Fifth and Ninth Circuits on which petitioner relied are no more than differences in detail without any difference in principle. (Jt. Br. Op. pp. 7-9). Prior to the decision below, the only dismissals for failure to state a claim which had operated as adjudications on the merits involved holdings that relief upon the claims stated or sought to be stated could not be granted by any court, not just by that particular court.

Angel v. Bullington, 330 U.S. 183 (1947). Here, the district court in the prior actions did not even consider, let alone decide, whether petitioner could obtain relief in state court.

Respondents characterize the difference between this action and all three prior actions as mere labelling. (Jt. Br. Op. p.5). They did not, however, claim that petitioner's allegation of their breach of written contracts, which is governed by the statute of limitations rather than the equitable doctrine of laches, does not properly overcome the laches ruling on which the Seventh Circuit affirmed the partial summary judgments in the last prior action. The breach of contract allegation was not advanced earlier because it would not have overcome, or even addressed, the mootness ruling on which the judgment of the district court had been based in that action. (Pet. Cert. p.6).

III. The Eleventh Amendment Issue Is Not Premature.

Respondents' statement of the third prior case omits any reference to the dismissal of petitioner's legal claims against S.I.U. and Illinois under 42 U.S.C. §1983 and the Fourteenth Amendment on the basis of their jurisdictional immunity under the Eleventh Amendment. (Jt. Br. Op. p.4). Similarly, they omit any reference to the Seventh Circuit's affirmance of such dismissal on the same grounds, *(Ibid.)* Again, respondents do not attempt to explain how the dismissal of petitioner's legal claims against S.I.U. and Illinois for lack of federal jurisdiction by reason of the Eleventh Amendment could operate as a final adjudication on the merits. In fact, the only reason they advance for not granting certiorari on the Eleventh Amendment issue is that it is "premature." (Jt. Br. Op. pp. 9-10). But unless respondents meant to advance the novel concept of a cause of action that is *res judicata* in federal court but not in state court, the logic of their argument is unfathomable. Moreover, as respon-

dents themselves point out, petitioner did file a later action in state court which they removed to federal court and obtained the dismissal thereof on the same *res judiciata* grounds. (Jt. Br. Op. pp. 5-6).

REPLY TO THE REQUEST FOR SANCTIONS

As indicated above and in the petition, respondents position on the questions presented, including the question of sanctions, is based primarily on the burden this litigation has placed on them. Petitioner, however, has been subjected to the burden of the same litigation. A decision on the substantive merits of her civil rights claims has been avoided thus far because the district court granted respondents' motions to dismiss some or all of the prior claims against each of them on grounds which petitioner could not cure by amendment or refiling. The court of appeals affirmed the prior judgments, but on grounds which she could so cure. (Pet. Cert. pp. 3-6). While respondents had the right to raise every pleading objection available, they can hardly complain of the burden their pursuit of such objections has engendered. Petitioner offered proper allegations to meet each pleading objection as soon as the objection was raised. In addition, respondents have proven wrong on both issues of statutory construction on which their pleading objections were based. Under *Guardians, supra,* the effect standard of the regulations is valid and damages are recoverable for intentional violations.

More importantly, the decision below conflicts with all of the applicable precedent at the time this action was filed. In fact, the district court specifically rejected the respondents' argument that the Rule 12(b)(6) dismissals in the earlier cases were necessarily on the merits and instead relied upon general preclusion principles. (609 F. Supp. at 1015; Pet. Cert. Supp. App. pp. B-7 to B-8. *Cf.* Pet. Cert. p. 3 n.1). The cases relied upon by the district court, however, held that dismissal of a prior complaint for failure to state a claim operated as an adjudica-

tion on the merits where relief on the claims stated or sought to be stated could not be granted by any court – not just by that particular court. That principle has no application to this case where the question of whether relief could be granted in state court was not considered either with respect to the claims made under state law in the first two prior cases or with respect to the legal claims for damages under federal law which were dismissed for lack of federal jurisdiction by reason of the Eleventh Amendment in the last prior case.

Accordingly, for the reasons set out above and the reasons for granting a writ of certiorari set out in the petition, the request for sanctions should be denied.

CONCLUSION

By attempting to minimize the direct conflict of the decision below with the decisions of this Court and other courts of appeals on Rule 41(b), respondents bare the flaw in their opposition to the petition. Their omission of any reference to the dismissal of claims made under state law for lack of pendent jurisdiction or the dismissal of legal claims for lack of federal jurisdiction by reason of the Eleventh Amendment grossly distorts the prior record. In light of respondents' inability to face the issues presented in the petition without such omissions, petitioner suggests that summary reversal may be in order.

Respondents claim that the Eleventh Amendment issue is premature. But review here cannot be premature when the alleged necessity of a further state court action plainly conflicts with the removal of such an action by respondents to federal court and the dismissal thereof on the same *res judicata* grounds.

For the foregoing reasons and the reasons set out in the petition, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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